

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDDIE L. SIMMONS and DEPARTMENT OF VETERANS AFFAIRS,
LONG BEACH VETERANS ADMINISTRATION HOSPITAL, Long Beach, CA

*Docket No. 01-1123; Submitted on the Record;
Issued February 15, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to rescind its prior acceptance of appellant's claim for an additional schedule award.

This is appellant's second appeal before the Board on the issue of appellant's schedule award. In the prior appeal, the Board remanded the case for further development in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The facts and circumstances of the case are set out in the Board's prior decision and are hereby incorporated by reference.¹

Upon remand the Office created a statement of accepted facts and referred appellant, a statement of accepted facts and the relevant case record to Dr. J. Pierce Conaty, a Board-certified orthopedist, for a second opinion on appellant's permanent impairment rating.

By report dated August 18, 2000, Dr. Conaty reviewed appellant's factual and medical history and the statement of accepted facts, noted his present complaints, performed a complete orthopedic examination and evaluated the radiologic findings. He diagnosed "mild post-traumatic degenerative changes to the patellofemoral joint of the right knee." Dr. Conaty measured losses in ranges of motion of hips, knees, ankles and feet/toes; he tested deep tendon reflexes and performed a neurologic examination and he noted that appellant's right knee demonstrated slight limitation in flexion, incisional tenderness and tenderness in the suprapatellar area, but he found no crepitation, no instability, no weakness, no Drawer's sign, no synovial thickening and one quarter inch atrophy as compared to the left. Dr. Conaty provided measurements in accordance with the A.M.A., *Guides* to determine appellant's degree of permanent impairment, rating appellant's pain as "mild" with no specific nerves affected and

¹ Docket No. 98-2437 (issued February 22, 2000) (on June 12, 1986 appellant fell, fracturing his right patella; on August 29, 1996 he again fell off a loading dock fracturing his right patella. The Office accepted a right closed patellar fracture as having occurred. On September 24, 1987 the Office granted appellant a schedule award for a 20 percent permanent impairment of his right lower extremity).

finding no interference with daily activities and no sensory loss. Ten degrees of loss of flexion was noted.

The Office referred Dr. Conaty's report to Dr. Arthur S. Harris, a Board-certified orthopedist and an Office medical adviser, who responded by report dated September 18, 2000. Dr. Harris reviewed Dr. Conaty's physical examination and diagnostic test findings, reviewed the other medical reports of record, noted the positive objective findings upon examination and testing and opined that in accordance with the A.M.A., *Guides*, (fourth edition, 1993) that appellant had a 10 percent permanent impairment of his right lower extremity due to quadriceps atrophy and chondromalacia of the patella. Dr. Harris noted that appellant had previously been awarded a 20 percent right lower extremity impairment which included an award for loss in range of motion, but he noted that award was based on an earlier edition of the A.M.A., *Guides* and that under the fourth edition, the present 10 degree loss in flexion was not ratable.² Dr. Harris utilized Table 64, p. 85 and Table 62, p. 83 in arriving at his impairment rating and he opined that the date of maximum medical improvement was August 18, 2000. He further opined that there was no significant change in appellant's condition from his 1986 injury.

The Office, however, on November 27, 2000 granted appellant a schedule award for an additional 10 percent impairment of his right lower extremity for the period August 18, 2000 to March 7, 2001 for a total of 28.8 weeks of compensation.

By decision dated February 21, 2001, the Office issued a decision rescinding the November 27, 2000 schedule award on the grounds that appellant was not entitled to an additional 10 percent impairment award for right lower extremity impairment. The Office found that its initiation of payment for an additional 10 percent schedule award was erroneous, based upon the well-rationalized reports of Drs. Harris and Conaty.

The Board finds that the Office properly rescinded compensation for an additional schedule award.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ However, the power to annul an award is not an arbitrary one and an award of compensation may only be set aside in the manner provided by the compensation statute.⁴ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true were, as here, the Office later decided that it erroneously accepted

² Table 41, p. 78.

³ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ *Shelby J. Rycroft*, 44 ECAB 795 (1993).

a claim.⁵ To justify rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.⁶

In this case, the Office, in reviewing appellant's case, found that the additional 10 percent schedule award was incorrect and that Dr. Harris's opinion, based upon Dr. Conaty's detailed examination and testing, as to the right lower extremity impairment of 10 percent applied to the entire impairment and not as an additional award, which would result in a total award of 30 percent of the right lower extremity. Therefore, a mistake of fact had been made. The Office corrected the mistake by rescinding the additional 10 percent schedule award and a preliminary overpayment was declared. Therefore, the Office met its burden of proof to rescind the erroneously granted award.

The record contains no probative evidence supporting that appellant has more than a 20 percent impairment of his right lower extremity, which had been previously awarded.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 21, 2001 is hereby affirmed.

Dated, Washington, DC
February 15, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

⁶ *See Marvin L. Ralph*, 47 ECAB 626 (1996); *Shelby J. Rycroft*, *supra* note 4.